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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 C. JACKSON BROWN and LAREE
10 LYNN BROWN,

11 Plaintiffs,

12 v.

13 SCRIPPS INVESTMENTS & LOANS,
14 INC., *et al.*,

15 Defendants.

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) CASE NO. C08-1166 RSM
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) ORDER DENYING DEFENDANTS'
) MOTION TO DISMISS
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16 **I. INTRODUCTION**

17 This matter comes before the Court on Defendants' Motion to Dismiss. (Dkt. #7).
18 Defendants argue that Plaintiffs' complaint should be dismissed for improper venue under
19 FRCP 12(b)(3). Defendants contend that a forum selection clause entered into by the parties
20 mandates that all disputes be brought in San Diego, California. Plaintiffs respond that the
21 clause is unenforceable because it is contained in an ancillary document to the original
22 agreement between the parties.

23 For the reasons set forth below, the Court agrees with Plaintiffs, and DENIES
24 Defendants' motion.

25 **II. DISCUSSION**

26 **A. Background**

27 This case arises out of an allegedly fraudulent investment sale between Plaintiffs C.
28 Jackson Brown and Laree Lynn Brown, and Defendant Scripps Investments & Loans, Inc.

1 (“Scripps”). Plaintiffs are a married couple residing in Woodinville, Washington, while
2 Scripps is a California corporation in the business of selling and issuing securities. In the
3 spring of 2005, and following what Plaintiffs describe as an aggressive campaign by
4 representatives of Scripps to induce Plaintiffs to invest, Plaintiffs advanced approximately
5 \$400,400 to Scripps. Plaintiffs indicate that this amount comprised all of their retirement
6 savings and substantially all of their assets.

7 Scripps used these funds as a part of a \$17.5 million commercial loan made by Scripps
8 to Defendant The Vineyard South, LLC (“Vineyard”), a Scripps’ subsidiary. The loan was
9 issued in connection with a real estate development project in California. In exchange for
10 their investment, Scripps represented to Plaintiffs that they would receive regular, periodic
11 payments of interest and principal.

12 Significantly, and prior to the investment, Plaintiffs completed an Investment
13 Questionnaire sent by Scripps. Plaintiffs disclosed financial information in this document,
14 including that: (1) in 2002 and 2003, their personal incomes were not over \$200,000, and their
15 joint income was not above \$300,000; (2) their estimated income for 2004 did not exceed
16 \$200,000; (3) they did not have a net worth over \$1,000,000; and (4) they were investing
17 more than 20% of their net worth. Plaintiffs also filled out a second Investment Questionnaire
18 two weeks after making their investment. Plaintiffs advised Scripps that no changes had
19 occurred since they filled out their first questionnaire.

20 Approximately one month after making their initial investment, Plaintiffs received their
21 first interest payment from Scripps in the amount of \$4,976.67. Plaintiffs indicate that after
22 this payment, they heard very little from Scripps over the next year. Moreover, on April 7,
23 2006, Scripps notified Plaintiffs that the developer was over budget and needed an additional
24 \$7 million to complete the project. The letter also requested Plaintiffs to authorize Scripps to
25 subordinate Plaintiffs’ interest to a new first position lender in order to ultimately add more
26 capital. Plaintiffs authorized this subordination.

27 On July 3, 2006, Plaintiffs received a second payment from Scripps in the amount of
28 \$43,870. Scripps further indicated to Plaintiffs that later that fall, Plaintiffs were entitled to

1 receive a final payoff of their investment and accrued interest. However, no such payment
2 was made. Instead, Scripps sent a status report to Plaintiffs on November 16, 2006, informing
3 them that the developer was in default and could not pay off the loan. As a result, Scripps
4 requested authorization from Plaintiffs to loan additional funds in order to protect the original
5 investment. Believing they had no choice, Plaintiffs executed this authorization as well.

6 As part of this approval, Plaintiffs signed an operating agreement verifying the creation
7 of a related Scripps entity, Scripps Vineyard South, LLC (“Scripps Vineyards South”).
8 Among other things, the operating agreement transferred Plaintiffs’ interest in the loans
9 originally made from Vineyard to Scripps Vineyards South. The agreement also contains a
10 clause entitled “Governing Law and Venue,” which states in relevant part:

11 This Agreement shall be governed by and construed under the laws of the State of
12 Delaware (without regard to conflict of laws principles) . . . [and] all actions and
13 proceedings arising in connection with this Agreement must be tried and litigated
14 exclusively in the state and federal courts located in the county of San Diego, State of
15 California, which courts have personal jurisdiction and venue over each of the parties to
16 this Agreement for the purpose of adjudicating all matters arising out of or related to
17 this Agreement.

18 (Dkt. #8, Decl. of Heack, Ex. A., § 14.7).

19 Meanwhile, Plaintiffs contend that Scripps periodically mailed newsletters and other
20 written communications to Plaintiffs. In these communications, Scripps again requested
21 additional funds from the original investor pool due to a series of setbacks, defaults,
22 construction and sales management issues and other problems with real estate development.
23 Plaintiffs were also advised by Scripps in December of 2007 that another Scripps’ affiliated
24 entity, Scripps Vineyards Villas, LLC (“Scripps Vineyards Villas”) had become the “owner”
25 of the project. Furthermore, Scripps Vineyards Villas was exploring the possibility of
26 bankruptcy to protect against foreclosure and sought approval from Plaintiffs to enter into
27 Chapter 11 bankruptcy. Once again believing they had no choice or control over this matter,
28 Plaintiffs complied with the request.

Eventually, in January of 2008, Scripps Vineyards Villas filed for chapter 11
bankruptcy in the Central District of California. As a result, Plaintiffs brought this lawsuit in

1 this Court against Scripps and its affiliated entities, as well as several individuals associated
2 with Scripps (hereinafter “Defendants”). Plaintiffs claim that all the communications made
3 by Defendants contained material misrepresentations and omissions that they relied upon to
4 their detriment. Plaintiffs also seek rescission of the underlying agreement, and a return of the
5 balance of the principal sums they invested with Defendants. This amount totals \$351,553.

6 Plaintiffs further allege that Defendants violated the Federal Securities Act, the
7 Washington State Securities Act (the “WSSA”), and the Washington Consumer Protection
8 Act (“CPA”). They also bring claims for breach of personal guaranty and negligence.
9 Defendants now bring the instant motion to dismiss pursuant to FRCP 12(b)(3) based on the
10 forum selection clause mentioned above.

11 **B. Standard of Review**

12 A motion brought pursuant to FRCP 12(b)(3) addresses the appropriate venue in which
13 a case should be brought. Unlike a FRCP 12(b)(6) motion to dismiss for failure to state a
14 claim, pleadings need not be accepted as true and the court may consider facts outside the
15 pleadings under FRCP 12(b)(3). *See Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th
16 Cir. 1996). Nevertheless, “in the context of a Rule 12(b)(3) motion based upon a forum
17 selection clause, the trial court must draw all reasonable inferences in favor of the non-
18 moving party and resolve all factual conflicts in favor of the non-moving party[.]” *Murphy v.*
19 *Schneider National, Inc.*, 362 F.3d 1133, 1138 (9th Cir. 2004). This principle is based upon
20 the effect of enforcing a forum selection clause, which forecloses suit in the jurisdiction of
21 plaintiff’s choice. *See id.* at 1139 (citing *New Mood Shipping Co., Ltd. v. MAN B&W Diesel*
22 *AG*, 121 F.3d 24, 29 (2d Cir. 1997)).

23 **C. Forum Selection Clause**

24 Notwithstanding the parties’ respective arguments discussing proper venue and choice-
25 of-law rules, or the availability of traditional defenses such as fraud and duress to interpret the
26 forum selection clause in this case, the Court finds that resolution of the instant case starts and
27 ends with the test set forth by the Supreme Court in *M/S Bremen v. Zapata Off-Shore Co.* 407
28 U.S. 1 (1972). *Bremen* clearly held that forum selection clauses are prima facie valid and

1 should not be set aside unless the party challenging the enforcement of such a provision can
2 show it is unreasonable under the circumstances. *Id.* at 12. A forum selection clause is
3 unreasonable if (1) the inclusion of the clause in the agreement was the product of fraud or
4 overreaching, (2) the party wishing to repudiate the clause would effectively be deprived of
5 his day in court were the clause enforced, or (3) enforcement would contravene a strong
6 public policy of the forum in which suit is brought. *See Richards v. Lloyd's of London*, 135
7 F.3d 1289, 1294 (9th Cir. 1998) (citing *Bremen*, 407 U.S. at 12-13, 15, 18). Any one of these
8 grounds is sufficient to invalidate a forum selection clause. *Argueta*, 87 F.3d at 325.

9 Although *Bremen* discussed forum selection clauses in the context of an admiralty case, “its
10 standard has been widely applied to forum selection clauses in general.” *Argueta*, 87 F.3d at
11 325 (collecting cases). The party challenging the forum selection clause bears the burden of
12 showing that enforcement would be unreasonable and unjust. *Bremen*, 407 U.S. at 15.

13 In the instant case, the forum selection clause is unenforceable because it satisfies all
14 the factors for unreasonableness set forth in *Bremen*. First, Plaintiffs sufficiently allege that
15 the inclusion of this forum selection clause is a product of overreaching by Defendants.
16 Although the Court recognizes that “a differential in power or education of a non-negotiated
17 contract will not vitiate a forum selection clause” on its own, *see Murphy*, 362 F.3d at 1141,
18 this finding is generally premised on the notion that unenforceability “would disrupt the
19 settled expectations of the parties[.]” *Id.* That is certainly the case here, as enforcement
20 would run contrary to Plaintiffs’ reasonable expectations. The forum selection clause is
21 contained in an operating agreement establishing Plaintiffs’ membership interests in a newly
22 created LLC. This LLC was created by Defendants in an attempt to save the initial
23 investment, and Plaintiffs had no true choice in signing the agreement. The operating
24 agreement is therefore an ancillary document that is unrelated to the underlying sale which
25 Plaintiffs seek rescission of. It is obvious to conclude that Plaintiff never expected to litigate
26 a claim in a foreign jurisdiction. It would be inequitable for the Court to find that the
27 provision expresses the true intent of the parties.

1 Nevertheless, Defendants argue that the clause encompasses all Plaintiffs' causes of
2 action, and that Plaintiffs should reasonably expect to adhere to litigation in California
3 because the agreement in which the clause is contained covers any and all disputes arising out
4 of the agreement. Defendants specifically suggest that "[b]ut for the Agreement, there could
5 be no investment, as the Agreement governs the investment in its entirety." (Dkt. #7 at 8); *see*
6 *also* Defs.' Reply (Dkt. #14 at 3) ("Were it not for the investment, there would be no LLC
7 agreement."). This logic is fundamentally flawed. In fact, the exact opposite is true. But for
8 Plaintiffs' original investment, no commercial loan could have occurred, and ultimately no
9 operating agreement forming Scripps Vineyard South would have been made. The operating
10 agreement was simply not a vital aspect of Scripps' original agreement with Plaintiffs.

11 Furthermore, no court has suggested that the analysis requires a trial court to completely
12 ignore the bargaining inequality of the parties. The Ninth Circuit has clearly held that the
13 *Bremen* analysis fundamentally requires a court to take into account "the factual
14 circumstances . . . and the underlying dispute which has brought the parties to court,
15 including any power differentials which may exist between the two parties to a contract."
16 *Spradlin v. Lear Siegler Mgmt. Servs. Co., Inc.*, 926 F.2d 865, 867-68 (9th Cir. 1991)
17 (emphasis added).

18 Here, there exists a significant disparity between Plaintiffs and Defendants. As
19 described above, Plaintiffs were unsophisticated investors who placed all their retirement
20 funds into this investment scheme. On the other hand, Defendants acknowledge that Scripps
21 is a California corporation in the business of selling and issuing securities who came into this
22 forum to solicit Plaintiffs' investment. Any doubt as to Defendants superior bargaining power
23 is further erased by Defendants' creation of several affiliated entities and subsidiaries in order
24 to save the investment. Consequently, it is clear that the forum selection clause was a result
25 of overweening bargaining power.

26 The second reason in support of a finding of unenforceability is that it would be
27 prohibitively expensive for Plaintiffs to litigate in San Diego, California. Courts are required
28 to consider a party's financial ability to litigate in the forum selected by the contract when

1 determining the reasonableness of enforcing a forum selection clause. *See Murphy*, 362 F.3d
2 at 1141-42 (citing *Spradlin*, 926 F.2d at 869). Here, and as mentioned previously, Plaintiffs
3 claim that they invested all of their retirement savings into this allegedly fraudulent scheme,
4 and that the savings also represented substantially all of their assets. As a result, Plaintiffs
5 contend that “[w]e have no other retirement funds or savings to rely upon to prosecute this
6 action.” (Dkt. #12, Decl. of Brown, ¶ 48). Plaintiffs further indicate that “[i]f the matter is
7 transferred to California, we cannot afford to hire California counsel to assist or replace our
8 existing [local counsel]. We certainly cannot afford to travel to or from California for
9 hearings or trial, or to compensate [local counsel] to travel.” (*Id.* at ¶ 49).

10 The Court has no reason to doubt these representations. It would certainly be unjust for
11 Plaintiffs to litigate a claim nearly 1,600 miles away given their financial circumstances.
12 Coupled with the Court’s duty to construe all reasonable inferences in favor of the non-
13 moving party, this ground weighs in favor of denying Defendants’ motion.

14 Lastly, the Court finds that enforcement of this forum selection clause would violate a
15 strong public policy of this forum. The Court initially notes that a party challenging
16 enforcement of a forum selection clause may not base its objection on a choice of law
17 analysis. *See Swenson v. T-Mobile USA, Inc.*, 415 F.Supp.2d 1101, 1104 (S.D. Cal. 2006).
18 Thus, Plaintiffs’ argument that application of Delaware law operates to bar enforceability of
19 the instant forum selection clause is misplaced. *See also Besag v. Cusom Decorators, Inc.*,
20 2009 WL 330934, at *4 (N.D. Cal. Feb. 10, 2009) (citing *Fireman’s Funds Ins. Co. v. M.V.*
21 *DSR Atlantic*, 131 F.3d 1336, 1338 (9th Cir. 1997)) (holding that “the Ninth Circuit has held
22 that the loss of a claim is insufficient to invalidate a forum selection clause based on public
23 policy grounds”).

24 Plaintiffs nonetheless have satisfied their burden in proving that this clause is
25 unenforceable on public policy grounds. Plaintiffs have made this showing because requiring
26 Plaintiffs to bring suit in California pursuant to an ancillary document to an allegedly
27 fraudulent transaction would directly violate Washington’s public policy. This policy
28 unequivocally protects Washington’s citizens by providing an adequate remedy for violations

1 of the WSSA and the Washington CPA, two acts that form the basis of Plaintiffs' claims.
2 Plaintiffs would have no equivalent remedy in California because of their inability to maintain
3 a lawsuit in that forum.

4 Overall, denying Defendants' motion to dismiss comports with notions of equity and
5 justice, as this case neither involves two complex parties nor substantial negotiations. Instead,
6 it involves financial representations made by Defendants to unsophisticated individuals. It is
7 unreasonable to require Plaintiffs to litigate a claim in a separate forum pursuant to a clause
8 that was unilaterally imposed on them, especially when the clause is contained in an operating
9 agreement forming a separate corporation. Indeed, Plaintiffs do not attack the validity of the
10 separate corporation or question the interpretation of the operating agreement forming the
11 corporation. Plaintiffs seek rescission of the underlying sale, and no forum selection clause
12 exists in the original agreement. Thus, the Court finds no justifiable reason to dismiss this
13 case.

14 **III. CONCLUSION**

15 Having reviewed the relevant pleadings, the declarations and exhibits attached thereto,
16 and the remainder of the record, the Court hereby finds and ORDERS:

17 (1) Defendants' Motion to Dismiss (Dkt. #10) is DENIED. Defendants are directed to
18 respond to Plaintiffs' amended complaint no later than thirty (30) days from the date of this
19 Order. Once Defendants respond, the Court will issue its initial scheduling order.

20 (2) The Clerk is directed to forward a copy of this Order to all counsel of record.

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22 DATED this 11th day of June, 2009.

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25 RICARDO S. MARTINEZ
26 UNITED STATES DISTRICT JUDGE
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